

SINGH (Migration) [2018] AATA 2118 (4 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr NARINDER SINGH
CASE NUMBER:	1514050
DIBP REFERENCE(S):	CLF2011/161103
MEMBER:	Justin Meyer
DATE:	4 June 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2) of Schedule 2 to the Regulations.

Statement made on 04 June 2018 at 10:50am

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) visa – Spousal relationship – Allegations of a sham marriage – Department home visit – Genuine relationship – Social aspects – Photographic evidence – Supportive statutory declarations – Commitment to the relationship – Detailed knowledge of each other's lives – Plan to build a house together – Support each other – Pool their financial resources – Credible witness – Decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 September 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 19 September 2011 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221(2).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because they found that the parties were in a contrived relationship and that the applicant is married to another person in India. The delegate therefore concluded that the parties were not in a mutually exclusive or genuine and continuing relationship with each other. The applicant appeared before the Tribunal on 2 March 2017 and 1 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Melody Akses (the sponsor), Klaudiajoy Oz, Sudesh Kumari, Eyyup Ilbeyi, Kamvir Singh, Harmanjit Kaur, and Roshini Piscioneri.
4. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi, Turkish and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearings.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

8. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties married on 13th of June 2011 in Melbourne, as evidenced by a certificate of marriage of that date. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

11. The delegate's decision

12. The delegate decided that the information obtained during a home visit to the applicant's family in India supports unfavourable information received on 10 September 2013 that the applicant entered into a contrived relationship with the sponsor for the sole purpose of obtaining Australian permanent residency. The delegate note that the applicant had not provided any comment on this information and the information obtained at the home visit in India. Therefore they concluded that the applicant was in a contrived relationship with the sponsor and that the applicant was in fact married to Gagandeep Kaur in India. The delegate was therefore not satisfied that the applicant was in a mutually exclusive or genuine and continuing relationship with the sponsor. They therefore found the applicant not to be the spouse or de facto partner of the sponsor as defined under the Act.
13. The applicant's claimed joint financial relationship was not evidenced to the applicant as only a bank account in the applicant's name was provided. The applicant's household evidence was limited to Vodafone statements which alone did not demonstrate living arrangements of the parties. The delegate said that his wife in India and his brother indicated that he lived with his cousin in Australia. The delegate noted no other household evidence indicating that the parties live together as a genuine spouse or de facto couple. The delegate considered social aspects and supporting statements about them which were not given any weight. Separate travel was noted by the delegate. The applicant's parents were said to not know who the sponsor was.

14. Other requirements for a spousal relationship

15. By way of background, the applicant is 38 year-old man who is an Indian national. The sponsor is an Australian citizen with Cypriot heritage. The applicant gave evidence that he had come to Australia in 2009 with his former wife – he was a dependent visa holder to her student visa. That marriage broke down. In November 2010 the parties claim to have met at a restaurant in Melbourne, where they had a common friend.

16. Financial aspects

17. The parties submitted that they have an informal arrangement to share expenses whereby the sponsor pays for the rent and water bills and the applicant pays for other household expenditure including groceries and other utility bills. Copies of water bills addressed to the sponsor and gas and electricity bills addressed to the applicant were provided to the Tribunal. Also provided were copies of the Applicant's bank statements demonstrating purchases of household staples.

18. The parties gave evidence of a joint bank account with Westpac for other daily expenses details of which were enclosed in a statement of this account in joint names.
19. The parties could identify their source of income from a Centrelink benefit and the applicant's employment such as taxi driving.
20. The evidence is that the parties are sharing their expenses for shopping, dividing the payment of their housing costs as against other day-to-day expenses.
21. Overall, I am satisfied that the parties are pooling their financial resources and sharing their day-to-day household expenses and that the financial aspects of the relationship are discernible. I give the financial aspect weight.

22. *Nature of the Household*

23. The parties have been living together and have continued to reside together, at different addresses in Melbourne.
24. The applicant and sponsor share domestic duties, the sponsor focussing on laundry and clothing, and washing dishes, whilst the applicant helps with vacuuming, and performs gardening jobs. The parties provided consistent information on the household arrangements they have together. They could describe eating habits and preferences for instance. In statutory declarations, the parties note that the sponsor is usually responsible for everyday household duties, including cooking and cleaning and that the applicant is responsible for financially supporting the couple.
25. Water bills show the name of the sponsor at a particular address and gas, and telephone and electricity bills are in the applicant's name also state this address. Letters from the Department of Health and Human Services dated 6 December 2016 are addressed to both parties at a joint address.
26. The parties note in statutory declarations that they have plans to build a new house together to move in to. The applicant's statutory declaration notes that he had looked at blocks of land in a suburb and had spoken to a bank about getting a loan but, unfortunately, this was not possible while he does not have permanent residence in Australia. The sponsor gave similar evidence along these lines in the first hearing.
27. The delegate noted that during the Department's site visit on 19 February 2015 the applicant's brother and the applicant's alleged wife in India – a person named Gagandeep - both stated that the applicant was living with his cousin in Australia. However there is no evidence before me that this is the case.
28. The parties were able to describe the home they live in clearly. Although there may have been some issues in the interview conducted by the department some years ago, I do not have similar concerns as a result of the two hearings the parties attended.
29. I am satisfied that the household arrangements of the parties are in keeping with a genuine and continuing spousal relationship.

30. *Social aspects of the relationship*

31. I find that the parties do not participate greatly in social activities. Nonetheless there is still a significant number of photographs which have been provided of the parties together with others. Meeting friends and family occurs from time to time.

32. The applicant's cousin, Karmvir Singh, stated in a declaration that he has known the sponsor for approximately six years. He noted that he has been to the parties' home at times for dinner and celebration and sees them as a very happy husband and wife. He remarked that the parties discuss and share some matters with him as well. In the first hearing he said that he had been to the parties' wedding. He added that the applicant's parents in India were unhappy about the relationship.
33. Harmanjit Kaur (Karmvir Singh's wife) stated in a statutory application that she had known the applicant since 2009. She stated the parties had been invited to her to home for birthday parties, festival celebrations and sometimes for dinner. The parties had invited her and her husband for parties and other celebrations as well. She considered the parties to be close and attached to each other.
34. Mihrap Cabokuglu, the sponsor's daughter from an earlier relationship, noted in a statutory declaration that she believed the parties' relationship to be genuine and saw how comfortable the parties were with each other. She stated the applicant is respectful towards the sponsor and people generally. She noted that her mother (the sponsor) had suffered from mental illness in the past and she believed that since being with the applicant her mother is more grounded and feels loved and appreciated.
35. Klaudiajoy Oz, a friend of the sponsor for ten years, stated in her statutory declaration that she sees the sponsor once a week and sees the applicant at the parties' house sometimes as he works long hours. She sees them cooking together.
36. Ilbeyi Eyyup, a friend of the sponsor of 10 years standing noted in his statutory declaration that he sees the parties together at their home. They live a relatively quiet life and find it challenging to socialise as often as they would like, he wrote.
37. Various of these declarants attended the hearings and gave oral evidence consistent with this information.
38. The applicant submits that the sponsor has struggled with her mental health issues and the applicant usually works night shifts. It is submitted that despite these challenges, the couple makes a dedicated effort to socialise with their friends and families as much as possible as well as spending quality time together.
39. Photographs were submitted to demonstrate that the parties present themselves as a married couple to their friends and family. There are photographs from earlier from 2017 holiday to Sydney taken with family members. There are also photographs the parties attending a family wedding in March 2013.
40. I find the parties to be a quiet persons and this may limit social activity to some degree, yet it is present.
41. The delegate noted that the applicant stated that he introduced the sponsor to his family and that the parties were looking forward to going to India to meet his parents. The delegate stated that the parties had never travelled overseas together, however the applicant had travelled separately since entering into a relationship.
42. The applicant submits that his statement should not have been taken to mean that he had introduced the sponsor to his parents – he was instead attempting to state that he had introduced the sponsor to his family in Australia, not to his parents in India.
43. The applicant submits his parents have refused to accept his marriage to the sponsor so it is entirely understandable that the sponsor has not accompanied the applicant to India.

44. It is by no means clear on the evidence exactly what the applicant's parents know of his marriage and relationship with the sponsor. I do not make a finding on that point. Nonetheless there is a significant amount of evidence from others, including family members, about an ongoing social aspect of the relationship and its recognition. I give weight to this evidence.
45. I am satisfied that the parties represent themselves to their friends and a range of family as being married and that their relationship is accepted by those people. I am satisfied that the social aspects of the relationship are indicative of the parties being in a genuine and continuing relationship. I give weight to the social aspect.
46. *Commitment to the relationship*
47. The Tribunal has had the advantage of interviewing the applicant and the sponsor together twice and being able to observe them together. The parties were aware of details of each other's lives.
48. The parties provided consistent information as to their plans for their future together including their plans for owning a home together.
49. Emotional support was evident, shown in care and knowledge of each other over a period of some seven years.
50. Overall I am satisfied that the parties displayed a degree of companionship and emotional support such as would be expected in an exclusive and genuine and continuing relationship.
51. I am satisfied with the explanations of the parties about the concerns raised by the department. I find that confusion as to questions posed in an interview explain apparent issues.
52. I find that the parties live lives more disjointed in terms of working hours and routines, and are different from the average person in this sense. Yet this does not reduce the parties' credibility when considering commitment.
53. The sponsor had not met the parents of the applicant however I find that this is caused by strained relations as earlier described between the applicant and his parents.
54. I find that the parties know facts about each other's families. In the circumstances this situation does not arouse concerns.
55. I consider the duration of the relationship and the length of time during which the persons have lived together, which is some eight years. The parties have known one another for a long period and I find that they have been in a genuine relationship for that period. I accept that there was a separation of the parties for a period of months in 2014, during which there was relationship strain, but this was a temporary separation, and the relationship resumed. From the evidence I find that the applicant's parents were active in their efforts to get the applicant to marry within his social and national group, particularly at that time of relationship strain.
56. The department, it was noted in the delegate's decision, received information on 10 September 2013 that the applicant entered into a contrived relationship with the sponsor for the sole purpose of obtaining Australian permanent residency. The information also states that the applicant paid \$30,000 to the sponsor to lodge the partner visa application. The allegation was that parties have never lived together, and that the applicant was living with his friends. Departmental officers conducted a home visit to the applicant's parents' home in

India on 19 February 2015 and interviewed a neighbour, and family members. The allegations and materials were put to the applicant at various stages in the appeal process and at the hearings.

57. The response of the parties to the circumstances of the case and to the allegations has satisfied me that the allegations do not detract from the genuineness of the relationship, for the reasons I have given.
58. Based on the evidence of the circumstances of the relationship I am satisfied that the parties have a mutual commitment to a shared life as a husband and wife to the exclusion of all others, and that they live together. I am satisfied the parties are in a spousal relationship within the meaning of s5F(2).
59. The Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship. Therefore the applicant meets cl.801.221(2)(c).
60. The applicant is a holder of a subclass 820 visa and the applicant continues to be sponsored by the sponsoring partner. It is more than two years since the applicant was granted the subclass 820 visa. Accordingly, the applicant meets the other criteria in cl.801.221(2) and therefore meets the criteria in cl.801.221.
61. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

62. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(2) of Schedule 2 to the Regulations.

Justin Meyer
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).